



October 15, 2020

Submitted via FOIA Online

National Freedom of Information Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, D.C. 20460
(202) 566-1677

Re: Freedom of Information Act Request for EPA Records Regarding Proposed Revisions to the Lead and Copper Rule under the Safe Drinking Water Act

Dear Freedom of Information Officer:

Earthjustice submits this request (“Request”) for records in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2016), and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. pt. 2. The purpose of the Request is to obtain records relating to EPA’s proposed revisions to the Lead and Copper Rule, promulgated pursuant to the Safe Drinking Water Act, Dkt. No. EPA-HQ-OW-2017-0300 (“LCR Proposed Rule”).¹

Earthjustice requests a public interest fee waiver for this Request.

Earthjustice seeks the unredacted records listed below. The use of the word “unredacted” means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you cannot disclose all of the information contained in a particular record, please provide us with a copy of the record with redactions of only the information that you have determined to be properly withheld and explain the basis for your determination that such information must be withheld.

The use of the word “records” herein means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, calendar entries, meeting agendas, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. The term “records” as used above also includes any personal email messages, telephone voice mails or text messages, and internet ‘chat’ or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, and including any attachments. Per EPA records management policy, electronic messages

¹ See National Primary Drinking Water Regulations: Proposed Lead and Copper Rule Revisions, 84 Fed. Reg. 61,684 (Nov. 13, 2019).

such as text messages are agency records, which must be preserved and made accessible under FOIA. *See* U.S. Env'tl. Prot. Agency, CIO 2155.3, Information Policy: Records Management Policy 4 (2018), <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>. Therefore, a production of responsive records must include records using services including, but not limited to: Google Chat, Google Hangout, Skype, Microsoft Teams, IBM Sametime, Novell Groupwise Messenger, Facebook Messenger, iMessage and all other texting services, Short Message Service (SMS) and Multimedia Messaging Service on devices including but not limited to, Blackberry, Windows, Apple or Android devices; and Google Voice, Twitter Direct Message, Slack, WhatsApp, Pigeon, Yammer, Jive, and all other internal or external collaboration networks.

For the purpose of this request, the term “records” shall exclude any documents that have been posted for public review in the following dockets, and Earthjustice is not asking EPA to search the following dockets in response to the Request:

- EPA-HQ-OW-2017-0300 (“National Primary Drinking Water Regulations: Lead and Copper Rule Revisions”)
- EPA-HQ-2020-001172 (FOIA Request: “Early LCR Proposal Responsive Documents”)

RECORDS REQUESTED

In accordance with FOIA, please provide us with the following records. Unless otherwise stated, the time period covered by these requests is January 1, 2012, onward.

- 1) All records reflecting or relating to communications about the LCR Proposed Rule or any draft thereof, between EPA staff and the any of the following, including the following or any employee(s), agent(s), or representative(s) thereof:
 - a. Water utilities, or associations of water utilities (including, but not limited to, American Water Works Association (AWWA) and Association of Metropolitan Water Agencies (AMWA));
 - b. State and local government agencies, or associations thereof (including, for example, Association of State Drinking Water Administrators);
 - c. Manufacturers, or associations of manufacturers, of plumbing products (including, but not limited to, the International Association of Plumbing and Mechanical Officials (IAMPO) and Plumbing Manufacturers International).
- 2) All records reflecting the possibility of EPA establishing a maximum contaminant level (MCL) for lead under the Safe Drinking Water Act.
- 3) All records reflecting EPA’s consideration of the establishment of “trigger levels” and “action levels” for lead under the Safe Drinking Water Act.

RECORD DELIVERY

To the extent practicable, Earthjustice seeks electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format). If any information requested herein was, but is no longer, in EPA's possession or subject to its control, please state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) is otherwise disposed of, and in each instance, please explain the circumstances surrounding and authorization for such disposition of it, and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Memorandum from Attorney General Eric Holder to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>. If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding;
- (5) If you do not use your discretion to release such complete and unredacted records: (a) examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt; and, (b) provide us with a copy of each record with redactions of only the information that you have determined to be properly withheld.

FEE WAIVER REQUEST

I. THIS FEE REQUEST SATISFIES THE FIRST FEE WAIVER REQUIREMENT AS THE REQUEST IS IN THE PUBLIC INTEREST

Pursuant to 5 U.S.C. § 552, we request a waiver of fees that EPA would otherwise charge for searching and producing the records described above because this Request satisfies both fee waiver requirements. First, FOIA dictates that requested records be provided without charge because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(l)(1). To determine whether the FOIA request meets this first fee waiver requirement, EPA analyzes four factors: (i) the subject of the request; (ii) the informative value of the information to be disclosed; (iii) the contribution to an understanding of the subject to the public; and (iv) the significance of

the contribution to the public understanding. 40 C.F.R. § 2.107(l)(2)(i)–(iv). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request.

A. Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government.” 40 C.F.R. § 2.107(l)(2)(i). The records concern “identifiable operations” because they relate to the LCR Proposed Rule under the Safe Drinking Water Act. The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by the federal agency will meet this threshold” of identifiable operations or activities of the government. Dep’t of Justice, Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers 27 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>. There is no question that this is such a case.

B. Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities

The next factor considered by EPA is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already . . . in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 15 C.F.R. § 4.11(l)(2)(ii), of government operations or activities. The LCR Proposed Rule does not discuss whether EPA considered adopting an MCL or lowering the lead action level and why such actions were not taken. Disclosure of the requested information will enable the public to both better understand EPA’s proposed revisions to a national rule regulating lead in drinking water. This information will also provide the public with context for understanding and reviewing the final LCR upon its release. Moreover, the Request specifically excludes materials that are “already in the public domain” due to their inclusion in the EPA’s public dockets.

C. Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the Lead and Copper Rule

EPA next considers whether disclosure will contribute to a broad “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, “as opposed to the individual understanding of the

requester.” *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” EPA’s LCR. 40 C.F.R. § 2.107(l)(2)(iii). The LCR regulates the monitoring and treatment of lead in public drinking water systems. Lead is a dangerous neurotoxin for which there is no safe level of exposure. It is especially dangerous for pregnant woman, infants, and children. Yet the drinking water for up to 22 million people across the country is delivered through lead pipes,² which naturally corrode when water flows through them. The Proposed LCR Revisions are the first major proposed revisions to the LCR in almost 30 years. Therefore, the LCR, and any proposed or final revisions of it, is of interest to broad segments of the public. The public’s ability to review and understand the context of the final LCR—expected to be released within a matter of weeks—is impaired by the lack of access to the information requested herein.

Earthjustice has the “ability and intention to effectively convey [this] information to the public.” § 2.107(l)(2)(iii). Earthjustice is a nonprofit environmental organization with lawyers, scientists, and public policy professionals on its staff. It has worked to keep public drinking water free of toxic chemicals like lead, and it has worked with EPA in the past to strengthen health protections in the Lead and Copper Rule. Earthjustice staff have expertise related to the regulation of contaminants in drinking water under the Safe Drinking Water Act, and they are well-prepared to evaluate the requested records once received.

Earthjustice also has mechanisms in place to share information obtained from the requested records with the general public and other interested organizations. It submitted and publicized comments—on behalf of over two dozen community groups and individuals—on the Proposed LCR Rule³ and has published numerous articles, blogs, social media postings, and press releases concerning the regulation of toxic chemicals in drinking water.⁴ Earthjustice is well-positioned to share the requested information with interested audiences. Earthjustice’s website receives approximately 413,000 page views per month and its quarterly print magazine has a circulation of approximately 100,000. Earthjustice also employs communications professionals that can disseminate newsworthy information obtained from this request to the media.

² David A. Cornwell et al., *National Survey of Lead Service Line Occurrence*, 108 J. AWWA 182, 190 (2016), http://media.mlive.com/news_impact/other/jaw201604cornwell_pr.pdf.

³ See Earthjustice et al., Comments on National Primary Drinking Water Regulations: Lead and Copper Rule Revisions (Feb. 12, 2020), <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0300-1469>.

⁴ See, e.g., Lisa Evans, *Leaking and Looming, Legacy Coal Ash Ponds Spew Poisons. Is There One Near You?*, Earthjustice (Oct. 1, 2020), <https://earthjustice.org/blog/2020-june/legacy-coal-ash-ponds-are-a-disaster-in-waiting-is-there-one-near-you>; Brian Keegan & Nydia Gutierrez, *New York Sets Drinking Water Safeguards: Coalition Urges Continued Action to Address Emerging Contaminants*, Earthjustice (July 30, 2020), <https://earthjustice.org/news/press/2020/new-york-sets-drinking-water-safeguards>; Nydia Gutierrez & Cliff Weathers, *Upcoming NY State Dept of Health Vote on PFAS In Drinking Water to Take Place While DOH Stalls on Disclosing Critical Public Comments*, Earthjustice (July 24, 2020), <https://earthjustice.org/news/press/2020/upcoming-ny-state-department-of-health-vote-on-pfas-in-drinking-water-to-take-place>.

D. Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all the information contained therein, through EPA’s website or internet searches. The Safe Drinking Water Act requires EPA to regulate contaminants in drinking water via an MCL, unless it is not “feasible” to ascertain the level of the contaminant in water. *See* 42 U.S.C. § 300g-1(b)(7)(A). EPA also admits that the 15 ug/L lead “action level” is not health based, and that there is no safe level of lead in drinking water.⁵ Thus, the public’s understanding of the LCR Proposed Rule, which neither implements an MCL nor lowers the lead action level, will “be significantly enhanced by the disclosure.” 15 C.F.R. § 4.11(l)(2)(iv).

II. THIS REQUEST SATISFIES THE SECOND FEE WAIVER REQUIREMENT AS EARTHJUSTICE HAS NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because the Earthjustice does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(3). Earthjustice is a 501(c)(3) nonprofit organization and it does not have any “commercial interest that would be furthered by the requested disclosure” of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of its mission to inform and protect the public on matters of vital importance to public health. Further, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

⁵ *See Basic Information About Lead in Drinking Water*, U.S. EPA, <https://www.epa.gov/groundwater-and-drinking-water/basic-information-about-lead-drinking-water> (last visited Sept. 2, 2020); *see also* 84 Fed. Reg. at 61,691 (“The EPA established the lead action level in the 1991 [rule] based on feasibility and not based on impact on public health.”).

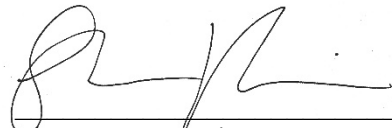
INSTRUCTIONS FOR RECORD DELIVERY

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must . . . indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 182 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please also produce the records on a rolling basis; at no point should EPA’s search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

Sharmeen Morrison
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
smorrison@earthjustice.org

If you find that this Request is unclear or if the responsive records are voluminous, please contact me at smorrison@earthjustice.org or (212) 284-8034 to discuss the proper scope of this Request. Thank you for your assistance.

Sincerely,



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